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IN THE

Supreme Court of the United States

October Term, 1962

No. 800

WILLIAM J. ADAMS, d/b/a BEACON HILL COMPANY, CORAL, INC. and LOUIS RAIT, INC.,

Petitioners,

against

MYRTLE G. HIRSCH, LENORA BENEDEK, JANET BENEDEK, GLADYS COHEN and HOWARD HIRSCH, d/b/a BELAND REALTY COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

This case does not involve a question of federal law—much less a substantial question of federal law—as would warrant the granting of a writ of certiorari. There are neither federal constitutional nor federal statutory principles involved herein; neither does the record draw into question any federal title, right, privilege or immunity. When stripped of all its factual complexities, this case involves simply a question of local procedural law in the New York State courts, presented in the context of the controlling provisions of the New York Civil Practice Act, as uniformly construed and applied by the New York State courts in the case at bar. It is axiomatic that the New

York State court's interpretation of the New York State Civil Practice Act is the final word on such a question, as presented by the instant record.

All that this case involves is whether upon the record below the New York State court was powerless to insist upon compliance with the provisions of the New York State Civil Practice Act requiring that in actions against a partnership—it is a jurisdictional prerequisite, which cannot be dispensed with—that one of the partners actually be served with process. This true nature of the issue herein has been glossed over by the petition, but instantly comes into focus when reference is made to the actual record and the opinion of the State court.

Corrected Statement of the Case

This case already has nearly a 9-year history, primarily because of the haphazard and dilatory fashion in which it has been prosecuted by petitioners (plaintiffs below);—indeed, petitioners took 16 months before they pursued an appeal to the Appellate Division of the New York State Supreme Court from the decision which gives rise to the instant petition. In a further effort to keep this stale litigation alive, petitioner has generated spurious questions seeking to convert an adjudication concerning the requirements of service of process under the New York State Civil Practice Act as somehow involving a question of substantive law—indeed, of federal constitutional law. Since petitioners' presentation of the facts has been selective, and to facilitate comprehension of the true question, we submit the following factual recital.

This case was commenced by the service of a summons and complaint on or about October 26, 1954, said service being made upon the superintendent of certain premises located in the County of Queens, City and State of New York.

The complaint alleged causes of action which had arisen in January 1954 when property belonging to the plaintiffs had allegedly been damaged by water at the aforesaid premises where plaintiffs were tenants.

There was only one defendant named in the original summons and complaint, to wit, "Beland Realty Corporation." The Beland Realty Corporation thus named as defendant was described in the complaint as follows:

> "2. On information and belief that at all the times hereinafter mentioned the defendant Beland Realty Corporation was and still is a Foreign Corporation organized under and pursuant to the laws of the State of New Jersey and was the owner of the premises aforesaid located at and known as 32-02 Queens Boulevard, also known as 4501-4523 Van Dam Street, and also known as 4502-4524 32nd Place, in Long Island City, Borough of Queens, City of New York."

The aforesaid corporation named and described in the complaint had been dissolved pursuant to New Jersey law a short time before the occurrence complained of but was empowered by New Jersey statutes to appear and defend actions brought against it after dissolution.

Petitioner's (plaintiff's) attorney, Martin Rosen, in an affidavit verified December 22, 1959, described the commencement of this action as follows:

> "The above entitled matter was submitted to me by the subrogating insurance carrier of the various plaintiffs herein. The information contained in the documents submitted to me and the investigation conducted by my own office indicated that Beland Realty Corp., a New Jersey corporation having its offices at 54 Clark Street, Newark, N. J., with a telephone number of Humboldt 2-0772, were in fact the Landlords operators and owners of the property."

It was conceded below that not one of the respondents (who are now defendants herein) was ever served with process in this case.

As the New York State Supreme Court at Special Term found:

> (a) The defendant corporation appeared in the action and filed a petition removing the action to the federal court. Simultaneously therewith it answered the complaint and denied that it owned, operated or controlled the premises at which the incident set forth in the complaint allegedly occurred.
>
> (b) After the case had been removed to the federal court it was permitted to languish there and once was dismissed for lack of prosecution on December 10, 1956. After the dismissal for lack of prosecution, it was not restored to the calendar until 1959.
>
> (c) The record clearly establishes that more than five years after the action had begun, the plaintiffs, at a pre-trial conference in 1959, urged that the corporate defendant was liable for the damages alleged in the complaint by virtue of that corporation's *de facto* control of the premises even if it did not own the building and as a result of the pretrial conference a preliminary trial without a jury was directed on the question of whether or not the corporate defendant could be held legally responsible if indeed the allegations of the complaint were sustained. However, this preliminary trial was never held.

It was after the aforesaid restoration of the case to the calendar in 1959 that the preliminary trial on the issue of the corporate defendant's liability was to be held. At that point in the pertinent procedural chronology, after

the case had been dormant for five years, the record shows that—

(a) The action had been commenced in New York against a New Jersey corporation—even though the plaintiffs' leases and the appropriate land records in the Register's office showed that a partnership owned the property.

(b) In spite of the foregoing and the fact that the corporation's answer denied ownership and control of the premises, the plaintiffs had done nothing for more than five years.

The petitioners were doomed to defeat in the federal court in the context of the preliminary trial that had been directed by District Judge Savage. Apparently, in the belief that they could not proceed on such a preliminary trial, to stave off the inevitable, the final procedural step taken by the petitioners (plaintiffs) in the district court against the defendant New Jersey corporation, was the gambit of moving, pursuant to the federal rules, to amend the caption of the action. That motion, in June of 1960, was deceptively simple; on its face all it sought to achieve, and indeed all that was ruled upon by the district court, was an amendment of the caption replacing the defendant New Jersey corporation with the respondents (see the order of District Judge Bruchhausen dated October 10, 1960, and his opinion, reprinted at page 35 of the petition herein, all of which confirms that the district court considered plaintiffs' motion as nothing more than an application made solely under federal rules 15 and 4(h). *Adgms v. Beland Realty Corp.*; 187 F. Supp. 680 (E. D. N. Y. 1960).

The district court, in permitting such an amendment, did not resolve any other question. It is clear from the District Judge's opinion that the court did not presume

to suggest, much less dictate, to the New York State Supreme Court—to which action was perforce remanded because the amendment of the caption destroyed diversity jurisdiction—how the New York State Court would thereafter proceed with the action. Nor did the district court presume to deprive the New York State Supreme Court of its power to resolve questions of State Court jurisdiction over the respondents who, six years after the commencement of the action, had for the first time been injected into the litigation as defendants and thereby exposed to personal liability, in place of the New Jersey corporation against whom plaintiffs had fitfully prosecuted their action up to that time.

To emphasize the limited nature of the question passed upon by the district court on the motion to amend the caption, it is pertinent to note what transpired in the Court of Appeals following District Judge Bruchhausen's order amending the caption and remanding the action. The respondents sought a writ of mandamus from the Court of Appeals for the Second Circuit. Their petition for mandamus was denied by a divided court (284 Fed. 2d 783). Judge Clark, speaking for the majority of the Circuit Court, wrote:

> "* * * Our intention has been merely to pass on the procedural aspects of the proceedings as brought before us * * *." (284 Fed. 2d 783)

Immediately following remand of the case, the question of jurisdiction was presented to the New York Supreme Court by the defendants-respondents' special appearance pursuant to Section 237-a of the New York Civil Practice Act. It was particularly appropriate for the New York Court to decide the jurisdictional question thus raised, since the action had originally been commenced in that Court and indeed, even under the federal rules, the amendment of the caption related back to the commencement of the action. (On this latter point both District Judge

Bruchhausen and Circuit Judge Friendly agreed; see p. 49 of the petition.) The defendants-respondents were before the New York Court for the first time. Concededly, they had never been served with process in the manner prescribed by the New York Civil Practice Act. The action was henceforth to proceed in the New York courts to a final disposition.

It is respectfully submitted that the New York Civil Practice Act unquestionably controlled the issue as to whether the New York Supreme Court had jurisdiction to entertain the action against these respondents. In a detailed opinion, Justice Rabin of the State Supreme Court determined that jurisdiction was not present (*Adams* v. *Hirsch*, 29 Misc. 2d 648, 214 N. Y. S. 2d 796). The Appellate Division of the Supreme Court unanimously affirmed that finding, without opinion (petition, p. 53).

Petitioners emphasize the weakness of their position on the instant petition when they once again—as they did in the state court—seek to create an aura of knowledge or participation about the respondents, during the six years when the case was languishing in the federal district court against the New Jersey Corporation. Thus, for example, the petitioners disingenuously state that in 1954 it was the respondents who sent the summons and complaint to the insurer. As was emphasized to the New York Court both at Special Term and in the Appellate Division, the record—and particularly certain documentary exhibits—established the inescapable conclusion that a Joseph Levin (not one of the respondents) had received the summons and complaint from the building superintendent and had forwarded those papers to the insurance broker. Mr. Levin was an officer of the corporate defendant—that corporation being the only defendant named in and served with process—and that corporation was the very defendant upon whom plaintiffs intended to serve their process and against whom they prosecuted the action for almost six years.

Petitioners' rehearsal of the facts not only pinpoints the absense of any federal question but refers this honorable Court directly to the opinion of the learned Justice at the New York Supreme Court, Special Term. That opinion contained precise findings of fact refuting petitioners' contentions. The entire record was before the state court both at Special Term, as well as in the Appellate Division. The opinion rendered at Special Term, which was unanimously affirmed by the Appellate Division, shows that the true facts were viewed in the perspective of their actual occurrence.

After reciting all the facts before it (as they have been set forth above), Justice Rabin at Special Term, framed the issue as follows:

> "Never having been served with process in this action in the manner provided by section 222-a of the Civil Practice Act, they urge that this court never acquired jurisdiction over their persons and consequently the personal judgment sought against them herein is beyond its power to grant."

The opinion of Justice Rabin then emphasizes that while plaintiffs conceded that they had not served any of the individual respondents hereto—indeed never intended to—plaintiffs took the position that the order of the federal court District Judge which amended the caption of the action was *res judicata* "on the question of jurisdiction over the persons of the present defendants". (Petitioners have now abandoned the inapplicable principle of *res judicata* and seek refuge solely beneath the loosely defined concepts of "comity" and "law of the case". Both of these policy doctrines were urged in the state court and they were rejected.)

Special Term's review of the record was followed by a discussion of the principles urged by petitioners (appellants below) in their attempt to preclude the state court from passing upon the question of its jurisdiction that had

been raised by respondents' special appearance. The state court rejected all of petitioners' attempts to bind that court by what had previously transpired.

After confirming the principle that the State Supreme Court had the right to determine its own jurisdiction "over persons upon whom no service of process in accordance with New York's standards was ever made", Justice Rabin cited the clear precedents applicable to the situation at bar which called for the granting of the motion before him. In particular, he rebuffed the tendered applicability of "law of the case" and "comity" as doctrines of convenience and discretion not applicable on the present record. Of course, the learned State Court Justice recognized that a state court could not presume to review a decision of the federal district court. However, in accordance with the settled precedents as hereinafter noted, the Court found itself free to determine questions of its own jurisdiction, when properly raised by the parties before it, in the posture of the case as it then stood before the state court at what was merely one further stage of the pending litigation.

Inherent in the opinion of Justice Rabin is the basic distinction between the nature of the motion to amend which was brought by appellants in the federal court and the motion to dismiss brought after remand by the respondents. (It is also appropriate to note that under the federal rules a partnership can be served by leaving process with a "managing or general agent" [Rule 4(d)(3) Federal Rules of Civil Procedure], while under the New York Civil Practice Act [Sec. 222-a] jurisdiction over the partnership can be obtained only by serving one of the partners.)

The issue then being presented by the respondents—who had been newly injected into the case—was thus properly raised for the first, at the earliest possible moment and in accordance with New York practice and procedure. After reviewing all the applicable precedents and examining the facts at bar in the light shed by the precedents applying

the pertinent New York Civil Practice Act provisions, the state court found that it was without power to proceed against the respondents.

In so deciding the issue before him, Justice Rubin was merely following the path unquestionably left open to him by District Judge Bruchhausen and the majority opinion of the Circuit Court. Indeed, the justice at the New York Supreme Court's Special Term was merely following the blueprint laid down by Circuit Judge Friendly (in his dissent on the petition for mandamus):

> "In my view the correct path here is the one Judge Clark has so clearly discerned but has then declined to follow. That is to grant the petition for mandamus to the limited extent of directing modification of the order of the District Judge to permit the service of an amended complaint upon the partnership and to leave all questions of the effect of this action to the state court. Far from that being a profit-loss venture, it seems to me essential not merely to protect these petitioners, whose conduct may not have been overly appealing, but to prevent unwarranted intrusion into the domain of the New York courts where the action began and where it will end."

Corrected Statement of the Question Presented

In the light of the actual record, the true question is whether a substantial federal question is presented by the decision rendered at Special Term, Part I, New York Supreme Court (Queens County), which determined that under the procedures and practices established by the New York Civil Practice Act—and, in particular, under Sections 222-a and 237-a thereof—that the state court had not acquired jurisdiction "over the persons of the individual defendants to grant the *in personam* judgment here sought." *Adams v. Hirsch*, 29 Misc. 2d 641, 214, N. Y. S. 2d 796, 803 (April 17, 1961).

Argument

It is settled beyond cavil that to invoke the certiorari jurisdiction of this Supreme Court under 28 U. S. C. 1257, to review the decision of a state court, the petitioners must establish that a substantial federal question has been properly raised in the state court proceedings. Petitioners concede, as indeed they must that only subsection (3) of Section 1257 is pertinent hereto and the provisions of that subsection require that the petitioners have drawn into question (a) the validity of a federal treaty or statute; (b) the constitutionality of a state statute; or (c) that the petitioners have set up a title, right, privilege, or immunity which they claim "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." It is respectfully submitted that the petitioners do not fall into any of the foregoing categories and that the record below does not disclose the existence of a substantial federal question herein. Therefore, the instant petition should be denied.

The petitioners' claim flies in the teeth of Justice Rabin's clear opinion applying the New York State Civil Practice Act to the facts as he found them upon the record. An objective reading of the record reenforces his opinion and confirms the absence of the requisite substantial federal question in the record before the state court.

The weight of the documentary evidence submitted to Justice Rabin at New York Supreme Court, Special Term, established that these respondents had not been brought before the state court in the manner provided by the New York State Civil Practice Act for the acquisition of jurisdiction over a partnership. Similarly, the overwhelming weight of the documentary evidence submitted established that under New York law, the respondents had neither waived such jurisdictional requirements nor had they participated in any of the prior proceedings against the New Jersey corporation so as to render themselves subject to

the jurisdiction of the New York courts. Thus, the learned state court justice, interpreting and applying the provisions of the New York State Civil Practice Act to the litigation as it was then before him, determined that the state court did not have jurisdiction to proceed against the respondents. It is uncontradicted in the record that none of the respondents were officers, stockholders or directors of the corporate defendant named in and served with the summons and complaint.

The applicable New York precedents were clear—and they are set forth in Justice Rabin's opinion—in requiring that the respondents' motion be granted.

To pinpoint the spurious nature of the federal question tendered by petitioners we emphasize the total absence from the pettion of any federal constitutional or statutory basis for the far-fetched argument that principles of comity and law of the case bind a state court to follow a district court's decision under the circumstances at bar.

I

The decision of the state court as enunciated by Mr. Justice Rabin at Special Term and unanimously confirmed by the New York Appellate Division, rested solely upon the ground of state procedure and practice and correctly applied the New York law. It is axiomatic that such a decision does not present a federal question.

The petition significantly does not raise any question as to the correctness of Justice Rabin's opinion interpreting and applying the New York procedural law to the facts at bar, which decision was unanimously affirmed, without opinion, by the Appellate Division of the New York Supreme Court. The opinion rendered by the Court at Special Term clearly establishes that this case does not truly involve any federal question whatever.

The petition herein fails to identify with particularity, the federal right which petitioners seek to assert in directing itself to the affirmance by the New York Appellate Court.

To the extent that petitioners are unhappy with the factual determinations reached by the state court, it is clear that these findings of fact by themselves do not give rise to any federal question. It is too well established to require citation of authority to support the proposition that this Court will not assert its jurisdiction to review state court decisions based solely on questions of fact.

It is also well established that state court decisions based solely upon state procedure and practice will not provide the basis for review by certiorari where that state procedure and practice does not itself draw into question federal constitutional issues.

Petitioners no doubt recognize this for what they urge is that the state court judge was precluded from considering the facts presented by the respondents' special appearance, even though the facts were presented within the proper procedural framework as permitted by state law, to test the jurisdiction of the state court.

The issue for consideration before the state court at Special Term was raised under New York Civil Practice Act, Section 237 a, pursuant to which the respondents had appeared specially (petition, pp. 6-7). Admittedly, none of the respondents had ever been served with process as required by New York law.

Since, under the federal rules, the decision of the district court is said to relate back to the commencement of the action, it returned the case to the state court in that very posture; therefore, even those rules cannot be held to have barred respondents from challenging the state court's jurisdiction *ab initio*.

The New York Civil Practice Act is clear in its single provision governing the service of process on a partnership. Section 222-a provides:

> "§ *222-a. Action or proceeding in partnership name.*
>
> "Two or more persons carrying on business as partners may sue, or be sued in their partnership name whether or not such name comprises the names of the persons. If the persons be defendants in an action or proceeding, the summons or other process may be served upon any one or more of them with like effect as though all of the persons had been named as defendants by their own respective names."

Why then, after six years of plaintiffs' (petitioners') failure to diligently prosecute the action, should respondents be barred from asserting a defense or objection which they would have been entitled to raise had petitioners proceeded properly and diligently at the outset?

The applicable New York precedent were uniform and completely dispositive of the procedural issues raised by respondents. The leading principle set forth in the New York case of *Erickson* v. *Macy*, 231 N. Y. 86, 90, as applied in situations parallel to the one presented by the instant record was found to lead inexorably to one result, to wit, the upholding of respondents' special appearance. Under New York law this decision was unquestionably correct. (See cases cited in the opinion below at 214 N. Y. S. 2d 796, 802-803; petition, pp. 32-34.)

II

The complaint in this action is not founded upon any claimed federal right; petitioners are incorrect in urging as a substantial federal question the refusal of the state court to be bound either by the doctrine of "comity" or "law of the case" to the district court's decision on the motion to amend.

When the record is read objectively and viewed in the light of all the proceedings which took place prior to remand, it is clear that the New York State Court was completely free to determine its own jurisdiction under the governing New York procedure, following remand. Neither the policy doctrine of "comity" nor of "law of the case" can be used to impart to the district court's opinion a significance which it did not purport to have, and which federal constitutional and statutory principles would not impose. Neither the district court nor the court of appeals sought to dictate to the New York State Court the course it should follow during the future conduct of the litigation after it was returned to the state court.

At the outset, for logical presentation, it is essential to note the well established rule that the jurisdiction of a district court on removal of a case from a state court is a derivative jurisdiction only, the federal court acquiring no greater jurisdiction over the person or the subject matter of the defendants than was originally obtained in the state forum where the action initially was launched. *Lambert Run Coal Co. v. Baltimore & Ohio Rg. Co.*, 258 U. S. 377, 42 S. Ct. 349, 66 L. Ed. 671; *Bonze v. Mardis Sportswear, Inc.* (2nd Cir. 1948), 165 Fed. 2d 33; *Ultra Sucro Co. v. Illinois Water Treatment Co.* (D. C. S. D. N. Y. 1956), 146 Fed. Supp. 393; *Shaye v. Wendy Wilson, Inc.* (D. C. S. D. N. Y. 1959), 171 Fed. Supp. 117. The import of the above decisions is that even removal by the very defendant served does not constitute a waiver of questions of service in the state court; as Judge Learned Hand held in *Bonze v. Mar-*

dis Sportswear, Inc., supra, at page 35, "* * * the first question (for the Federal Court) is whether the service was valid under the New York decisions."

We come next to the consideration of the posture of the instant litigation upon remand to the state court. The respondents had been propelled into the action more than five years after it had been commenced. The motion which thrust them into the litgation was one to amend the caption and was made solely under the federal rules. No consideration was given by the federal district judge to state law provisions governing amendment of caption, substitution of parties or service of process. Had he done so, he could not have granted the relief requested; the law of New York is unquestionably clear in its application to the vital interlocking questions of substitution of parties, amendments of caption and service of process as they appear on this record—and as established by Mr. Justice Rabin in his opinion, New York law does not permit the continuation of this action against these individual respondents. The significance of the foregoing in reference to the instant petition is to establish that the question before the state court was not the same question as ruled on by the district court. Therefore, even if considerations of comity or law of the case were properly raised they would not require a result contrary to the one reached.

It is obvious that with the state law so clearly opposed to petitioners' contentions, they have been unable to muster a head-on attack against the decision below—but, have set out to engulf this Court with a plethora of inapplicable decisions upon the broad policy concepts of "comity" and "law of the case", concepts which were considered below and found inapplicable to the situation at bar.

Certainly, where a case is remanded, *ab initio*, to the state court, the basic questions of jurisdiction, service and capacity must be left to the state court for its determination. Let us pause to consider how inequitable a contrary

situation would be; if the plaintiffs had initially named and designated these respondents as defendants, and had attempted to serve them, they unquestionably would have had the right to appear specially and contest the jurisdiction over them. Are they now to be denied that opportunity because the petitioners had sputtered and blundered for almost eight full years from the commencement of this action? We respectfully submit that the answer to the foregoing question is self-evident upon this record.

We respectfully submit that it is clear beyond question that after remand the case continues in the state court to be governed by all the procedures available to the parties under state law.

In *Ayres v. Wiswall*, 112 U. S. 187, 190, 38 L. Ed. at 695, in a case where remand to the state court was directed after one of the defendants had interposed his answer while the case was in the federal court, Mr. Chief Justice Waite writing for the Supreme Court used the following significant language in his opinion:

> "The fact that Ebenezer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the State Court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction."

Remand of a case leaves the respective litigants free to continue their dispute in the state courts and they "retain such rights as they may have to continue the litigation in the state court. * * *" *U. S. v. Rice*, 327 U. S. at 749, 66 S. Ct. at 838. See also *In re Bear River Drainage District*, 267 F. 2d 849 (10th Cir. 1959).

In his decision below the justice presiding at Special Term rejected the applicability to the circumstances at bar of those nebulous concepts known as "comity" and "law of the case".

In urging that the principal of comity "requires" that the district court's order amending the caption of the action be accorded absolute recognition, binding upon the state court, petitioners ignore the very definition of comity. Comity implies the grant of a privilege "not as a matter of right but out of deference and good-will." (Black's Law Dictionary 4th ed.). Thus, the principle is most frequently encountered in proceedings involving disputes, which have contacts with courts of different nations. By definition comity is voluntary assent which is not applied when the decision urged is contrary to the known policy or rules of the forum in which its application is sought (Black's Law Dictionary, *supra*). Also, the question upon which comity is urged must be the "like" question which was previously decided.

By definition, this concept merely gives a court the opportunity to refuse to reopen a matter which has previously been determined or passed upon by a court at a prior stage in the "same" case. Most frequently its application is limited to decisions, judgment, opinion or ruling on a former appeal in the case (see Black's Law Dictionary, 4th ed., p. 1030, wherein it is said: "The doctrine expresses practice of courts generally to refuse to reopen what has been decided"). By this time we believe it virtually *prima facie* that the doctrine cannot be applied to bar the decision rendered at Special Term upon an issue and question never before the District Court. In any event, as Mr. Justice Rabin emphasized below, in *Ragen v. McCloskey* (305 N. Y. 75, 78)—"the Court of Appeals stated that the doctrine of law of the case, as distinguished from *res judicata* is, therefore, not binding upon this court" (508).

The appellant's contention as to the applicability of the doctrine of the "law of the case" was fully considered below. It was rejected because the case before the state court, after remand, did not present the same issue that had been decided by the district court and indeed, as confirmed by the Second Circuit in both the majority and dissenting opinions on petition for mandamus. Justice Rabin's finding that nothing in the prior proceedings could bar his

determining whether or not New York courts had jurisdiction to proceed with the case is a finding which has the overwhelming support of applicable legal precedents and the principles governing the relationship between federal and state judicial systems.

The authority offered by petitioners is indeed remote, and oft times self-defeating. For example, the *Paramount* case cited at page 16 of the petition defeats rather than supports petitioners, for in that case the New York court refused to prejudge the jurisdiction of the English court, leaving it to the court of the forum (England) to determine the effect of its own process (236 App. Div. 756; 11 N. Y. S. 2d at 772).

Equally self-defeating is the citation from the *Benham* case (p. 16 of the petition).

Petitioners' present numerous cases supposedly typifying the applications of "comity" or "law of the case"; but, not one of these cases supports the contention that a federal question arises when after remand, upon the record at bar, the state court proceeded to determine that it did not have jurisdiction and could not proceed under state law.

Whether or not the New York courts were bound by principles of comity or law of the case to foreclose the respondents, after remand, from attacking the *in personam* jurisdiction of the New York courts over them, is not a federal question which serves as the prerequisite for granting a petition for certiorari.

In concluding their argument petitioners summarize their position as urging this Court "to hold as a matter of law that the doctrines of comity and the law of the case supplemented by *stare decisis* prevented the state court from ruling upon its own jurisdiction. It is respectfully submitted that this summary, in petitioners' own words, is a concession that the record does not present the requisite federal question to warrant granting the writ sought.

The issue before the state court following remand was clearly a different issue than the one which had been presented to the district court. The state court was fully aware of this distinction. Upon the arguments of "comity" or "law of the case", the state court was free to determine that there did not exist sufficient identity between the issues and the parties so as to require blind adherence to the determination of the district court. Indeed, a mere comparison of the district court's opinion with the opinion of Special Term makes it self-evident that entirely different issues were being litigated before the state court. Having failed to establish any supervening federal question, the petition must fall under the long-established principle that such questions as comity and law of the case are for the exclusive determination of the state court and will not be reviewed by this Supreme Court (see: *Allen* v. *Alleghany Co.*, 196 U. S. 458, 465, 49 L. Ed. 551, 556, citing *Finney* v. *Guy*, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. 558).

CONCLUSION

The petition is completely without merit. Petitioners have completely failed to establish any federal question whatever on this record to support their argument that "comity" and "law of the case" precluded the state court from passing upon its jurisdiction. The petition should be denied.

Dated: March 9, 1963.

Respectfully submitted,

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